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Supreme Court of the United States

October Term, 1957

No. 825

DEROY FLOYD, FRANCES FLOYD DYAL, IRENE FLOYD WILLIAMS, and W. D. FLOYD, ROBBY RAY FLOYD, BOBBY GENE FLOYD, DAVID EARL FLOYD, JAMES PRICE FLOYD, HAZEL FLOYD, J. E. FLOYD and JO ANN FLOYD, minors, by and through their next of friend, their father, DEROY FLOYD, PETITIONERS,

versus

COMPLETE AUTO TRANSIT, INC., RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Supreme Court of the United States

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No._____

DEROY FLOYD, FRANCES FLOYD DYAL, IRENE FLOYD WILLIAMS, and W. D. FLOYD, ROBBY RAY FLOYD, BOBBY GENE FLOYD, DAVID EARL FLOYD, JAMES PRICE FLOYD, HAZEL FLOYD, J. E. FLOYD and JO ANN FLOYD, minors, by and through their next of friend, their father, DEROY FLOYD, PETITIONERS,

versus

COMPLETE AUTO TRANSIT, INC., RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners pray that a Writ of Certiorari issue to review the decision and judgment of the United States Court of Appeals for the Fifth Circuit, dated and entered in this case on November 13, 1957.

OPINIONS BELOW

The opinion of the District Court (App. 21) is unreported. The opinion of the Court of Appeals (App. 26) is reported in 249 F. (2d) 396, and its opinion on petition for rehearing (App. 41) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 13, 1957 (App. 32). Petition for rehearing (App. 33) was denied on January 14, 1958 (App. 34). The

jurisdiction of this Court is invoked under the provisions of 28 U. S. C. 1254.

QUESTIONS PRESENTED

1. Did the Court of Appeals have the power under the constitutional limitation of the Seventh Amendment to review the question of alleged excessiveness of the jury verdict in a tort action for unliquidated damages not ascertainable with mathematical certainty and resting upon inabsolute elements?

2. May the Court of Appeals, assuming it has appellate power to review the denial by the trial judge of a motion for a new trial on the ground that the verdict was excessive, disturb such action of the trial judge which was not without support in the record?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Constitution, Amendment VII:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of common law."

Georgia Code Section 105-1306:

> "Homicide of wife or mother—The husband may recover for the homicide of his wife, and if she leaves child or children surviving, the husband and children shall sue jointly and not separately with the right to recover the full value of the life of the decedent, as shown by the evidence, and with the right of survivorship as to said suit, if either shall die pending the action."

Georgia Code Section 105-1308:

> "Full value of life of decedent, as shown by the evidence defined—The full value of the life of the decedent, as shown by the evidence, is the full value of the life of the decedent without deduction for necessary or other personal expenses of the decedent had he lived."

STATEMENT

Petitioners, residents of Georgia, surviving husband and ten children of Mamie M. Floyd, deceased, brought suit under the wrongful death statute of Georgia, Code Section 105-1306, to recover damages against respondent, a Michigan Corporation, for the negligence of its employee and servant in the operation of one of its tractor trailer vehicles while proceeding along a highway in Georgia, as the result of which the tractor trailer of respondent overtook and struck a farm tractor upon which Mrs. Floyd was riding, causing her to be thrown therefrom to the ground and to sustain injuries from which she died on August 2, 1955. At the time of her death, Mrs. Floyd was 39 years of age.

The jury brought in a verdict of $107,500.00 in favor of petitioners upon which judgment was entered. Upon consideration of respondent's motion for new trial, the District Court denied same, whereupon the respondent appealed to the Court below.

On appeal, the Court below reversed as to the issue of damages solely "upon the ground that the court below (District Court) abused its discretion in refusing to set the verdict aside as excessive", without pointing out any specification of abuse.

The cause of action for death under the applicable Code Section 105-1306 "is jointly given to the husband and children surviving at the time the action is brought, irrespective of the age of the children and questions of dependency and contribution. *Lewis v. Williams*, 78 Ga. App.

494, 51 S. E. (2d) 532; *Peeler v. Central of Georgia Ry. Co.*, 163 Ga. 784 (2d), 137 S. E. 24.

The damages recoverable by the husband and children surviving, as beneficiaries under the Code, are the full value of the life of the decedent without deduction for necessary or other personal expenses of the decedent had she lived, Georgia Code Section 105-1308, which include (1) the present cash value of the future earnings of deceased during her life expectancy had she lived and (2) the present cash value to each of the beneficiaries of the loss of the future services the deceased would have rendered as a wife and mother during her life expectancy had it not been for her untimely death, assessed by the jury "in the light of their own observation and experience and to the satisfaction of their own consciences." *Pollard v. Kent*, 59 Ga. App. 118, 200 S. E. 542; *Standard Oil Co. v. Reagan*, 15 Ga App. 571, 84 S. E. 69, and "gross mistake or undue prejudice or bias" can not be inferred merely from the size of the verdict, *Blue's Truck Line, Inc., v. Harwell*, 59 Ga. App. 305, 200 S. E. 500.

That the value of the domestic services which a decedent would have performed as a wife and mother during her life expectancy had she lived is not ascertainable with mathematical certainty and rests upon inabsolute elements is manifest from the decision of the Court below wherein it states that the privilege of having the wife and mother in the home, an element of damages, is "not readily evaluated by dollar standards" and that "the value of domestic services rendered by a wife could include 'the value of many services incapable of exact proof.' " And in *Standard Oil Co. v. Regan, supra*, the Georgia Court stated "that there need be no direct or express evidence of the value of the wife's services, either by the day, week, month, or any period of time, or of any aggregate sum."

The amount of damages assessed by the jury was supported by the evidence of record showing (1) the earning capacity of deceased, (2) her age at the time of death, (3) her probable life expectancy, (4) the habits, disposition and proclivities of the deceased to her husband and ten children, to wit, her tender ministrations, unselfish devotion and countless loving services, the manual work performed by her on the family farm and the work performed in and about the house, consisting, *inter alia*, of making beds, cooking, washing, ironing, patching clothes, mopping and yard sweeping (R. 162-166).

REASONS FOR GRANTING THE WRIT

1. **Existing conflict among the Circuits on the issues presented:** The issues in this case are (1) whether, in tort actions for wrongful death where the damages recoverable are not ascertainable with mathematical certainty and rest upon inabsolute elements, federal appellate courts have the power to review for error of fact the question of the excessiveness or inadequacy of jury verdicts, and (2) assuming that such power exists, whether a federal appellate court may disturb the action of trial judge refusing to grant a motion for a new trial made on the ground that the verdict is excessive where such action of the trial judge is not without support in the record.

On the first issue clearly there is an existing conflict among the Circuits. *Weathersbee v. Elgin, Joliet and Eastern Ry. Co.*, (7th Cir.), 191 F. (2d) 302.

Other than the 5th Circuit, *Whiteman v. Petrie*, 220 F. (2d) 914, the only other Circuits holding that federal appellate courts are empowered to review the question of the excessiveness of damages in a tort action where the damages are not ascertainable with mathematical certainty and rest upon inabsolute elements are the 4th Circuit, Vir-

ginia Ry. Co. v. Armentrout, 166 F. (2d) 400 and the 9th Circuit, *Cobb v. Lepisto,* 6 F. (2d) 128. But the latter Circuit in *Southern Pac. Co. v. Guthrie,* 186 F. (2d) 926, although it concluded that the verdict was too high, held that it could not reverse the action of the District Court in denying motion for new trial made on the ground that the verdict was too high. The correctness of its holding in *Cobb v. Lepisto, supra,* was therein considered, and in the concurring opinion of Judge Bone it was stated that the *Lepisto case* should be specifically overruled because "the doctrine of that old case lacks support in pronouncements of the Supreme Court and only one Circuit seems to have relied on it as authority for the principle that a federal appellate court may arbitrarily reduce the size of a verdict merely because it regards it as excessive."

In undertaking to review the question of excessiveness of damages, the 5th, 4th and 9th Circuits, recognizing the impact of the decisions of the United States Supreme Court and other federal appellate courts, seek to justify their right to review this question by the "scholastic refinement" of treating it as a review of whether there has been an abuse of discretion by the trial judge in refusing to set aside the verdict by the jury. On this point, Judge Learned Hand, speaking for the Court of Appeals for the 2nd Circuit in *Miller v. Maryland Casualty Co.,* 40 F. (2d) 463, disapproved as impracticable the rule that federal appellate courts have power to review the question of excessiveness of damages by the "scholastic refinement" of changing its name to a review of whether there has been an abuse of discretion. Just as this Court, in *Tiller v. Atlantic Coast Line R. Co.,* 318 U. S. 54, reasoned and concluded that under the Federal Employers' Liability Act the lower court cannot permit the defense of "assumption of risk" by changing its name to "non-negligence," so likewise in the case at bar, in accordance with the long and unbroken line of de-

cisions that federal appellate courts cannot review the question of excessiveness of damages, it is respectfully submitted that the Court below should not be permitted to review this question by changing its name to "abuse of discretion." The reasoning of this Court in the *Tiller case* applies with equal force in the instant case.

If a refusal by a trial judge to grant a motion for new trial made on the ground that the damages are excessive or inadequate may ever be reviewed by appellate courts on the ground that the trial judge abused his discretion, it could only be reviewed under the circumstances noted in *Fairmont Glass Works v. Cub Fork Coal Co.*, 287 U. S. 474, 483, 484; namely, when the amount of damages exceeds a statutory limit, *Southern Railway-Carolina Div. v. Bennett*, 233 U. S. 80; or is more or less than an undisputed amount, *Glenwood Irrigation Co. v. Vallery*, (C. C. A. 8) 248 Fed. 483; or is in pursuance of erroneous instructions on the measure of damages, *Chesapeake & Ohio R. C. v. Gainey*, 241 U. S. 494; or is in clear contravention of the instructions of the trial court, *United Press Asso. v. National Newspaper Asso.*, (C. C. A. 8) 254 F. 284; or the verdict is the result of passion, prejudice or caprice, *Chicago, Rock Island & Pacific R. Co. v. Kifer*, (C. A. 10) 216 F. (2d) 753, 756, 757. None of these circumstances is present in the case at bar. Compare *U. S. v. Socony*, 310 U. S. 150, 247, and *Stevenson v. Hearst Consol. Publications*, (C. A. 2), 214 F. (2d) 902, 911, 912.

Nor does the *dicta* comment by this Court in *Affolder v. New York, C. & St. L. R. Co.*, 339 U. S. 96, lend support to any implication that the question of excessiveness of damages is subject to review by federal appellate courts, as such an interpretation would do violence to the 7th Amendment to the United States Constitution.

Moreover, the question of excessiveness of damages was not considered by the Court of Appeals in the *Affolder case*

and thus the comment by this Court could not support any implication that such question may be reviewed. Additionally, the word "monstrous" used by this Court in the *Affolder case* was part of a "quotation" taken from Carrington, K. B., 2 Wilson 244, 24 Eng. Rep. 790, which laid down the standard for granting or denying a motion for a new trial by the trial judge, and had no application to the standard to be applied in appellate review, *St. Louis Southwestern R. Co. v. Ferguson*, (C. A. 8), 182 F. (2d) 949, 955.

In direct conflict with the 5th, 4th and 9th Circuits on both issues herein involved are the following Circuits:

First Circuit: *New York, N. H. & H. R. Co. v. Zermani*, 200 F. (2d) 240;

Second Circuit: *Miller v. Maryland Casualty Co.*, 40 F. (2d) 463; *Powers v. Wilson*, 110 F. (2d) 960; *Stevens v. Hearst Consol. Publications*, 214 F. (2d) 902;

Third Circuit: *Lubeck v. William A. Jarvis, Inc.*, 250 F. (2d) 285;

District of Columbia Circuit: *Rankin v. Shayne Bros. Inc.*, 234 F. (2d) 35;

Sixth Circuit: *Spero-Nelson v. Brown*, 175 F. (2d) 86;

Seventh Circuit: *Weathersbee v. Elgin, Joliet and Eastern Ry. Co.*, 191 F. (2d) 302; *Bucher v. Krause*, 200 F. (2d) 576:

Eighth Circuit: *St. Louis Southwestern Ry Co. v. Ferguson*, 182 F. (2d) 949; *Chicago, Rock Island & Pac. R. R. Co. v. Williams*, 245 F. (2d) 397;

Tenth Circuit: *Chicago, Rock Island & Pacific R. Co. v. Kifer*, 216 F. (2d) 753.

The allowance of the petition in this case would afford this Court the opportunity to review the problems involved herein in their entirety and resolve the existing conflicts among the Circuits.

2. The decision herein violates the 7th Amendment and is not in accord with applicable decisions of this Court: The decision in the Court below is in direct conflict with the rule established by a long and unbroken line of decisions of this Court that federal appellate courts are not empowered to review either a judgment for excessiveness of damages or the action of a trial court in granting or denying a motion for a new trial for error of fact, and this rule is applicable where the ground of the motion is that the damages awarded by the jury are excessive or inadequate.

Fairmount Glass Works v. Cub Fork Coal Co., 287 U. S. 474;

Eastman Kodak Co. v. Southern Photo Materials Co., 273 U. S. 359;

Southern Railway-Carolina Div. v. Bennett, 233 U. S. 80;

Herencia v. Guzman, 219 U. S. 44;

City of Lincoln v. Power, 151 U. S. 437;

N. Y., Lake Erie and Western R. Co. v. Winter, 143 U. S. 60;

Arkansas Valley Land & Cattle Co. v. Mann, 130 U. S. 69.

This rule against appellate review is a constitutional limitation which stems from the Seventh Amendment to the United States Constitution, *Parsons v. Bedford*, 3 Pet. 433; *New York Central and H. R. R. Co. v. Fraloff*, 100 U. S. 24. Re-examination by an appellate Court of facts on the question of damages found by a jury is a re-examination by the court in a mode not known to the common law, and, therefore, a violation of the 7th Amendment. The only modes of re-examining the facts known to the common law are the granting of a new trial by the Court where the issue is tried or to which the record is properly returnable, and an award of a *venire de novo* by an appellate court for some error of law. *The Abbotsford v. Johnson*,

98 U. S. 440, 444, 445; *City of Lincoln v. Power*, 151 U. S. 437.

Another reason given for denial of review by appellate courts is that the granting or refusing of a motion for a new trial is a matter resting solely within the discretion of the trial court. *Fairmount Glass Works v. Cub Fork Coal Co., supra.*

Since the decision of this Court in *Affolder v. New York, Chicago & St. P. L. R. Co.*, 339 U. S. 96, there has arisen a conflict among the circuits as to whether this Court has departed from the rule stated in *Fairmount Glass Works v. Cub Fork Coal Co., supra*, and the above cited cases that federal appellate courts have no power to review the excessiveness of a verdict.

In *Southern Pac. Co. v. Guthrie*, 186 F. (2d) 926, the Ninth Circuit refused specifically to overrule its former decision of *Cobb v. Lepisto, supra*, claiming that the power to review the size of the verdict is derived from *dicta* comment by this Court in *Affolder v. New York, Chicago & St. P. L. R. Co., supra*, where the Court remarked in passing that $80,000.00 for a lost leg was "not monstrous". But for a contrary meaning of the *dicta* comment of this Court in the *Affolder case*, see *St. Louis Southwestern Ry. Co. v. Ferguson* (8th Cir.), 182 F. (2d) 849 and *Stevenson v. Hearst Consol. Publication* (2nd Cir.), 214 F. (2d) 902. Obviously, there is sufficient diversity of judicial opinion to indicate that the effect of *Affolder v. New York, Chicago & St. P. L. R. Co., supra*, upon the issues herein presented is hardly free from doubt. The allowance of the petition in the case at bar would afford this Court the opportunity to resolve the prevalent doubts and conflicts among the circuits on an important question of appellate review and would be conducive to the fair and efficient administration of justice.

3. The action of the Court below constituted an invasion of the province of the jury and usurpation of the prerogative of the trial judge and is in direct conflict with Neese v. Southern Ry. Co., 350 U. S. 77: The Court below undertook the power to review and weigh the question of excessiveness of damages and reversed for the reason that in its opinion injustice has resulted from the action of the trial judge in exercising his discretion refusing to set aside the jury verdict because of the size of the award. The petitioners challenge both the power and the assumption of the Court below. They submit that not only did the Court below violate the rule that federal appellate courts have no power to review the size of the verdict in a suit of the nature herein, but also that the amount of the verdict in the instant case is amply supported by the evidence of record, and, therefore, the action of the Court below is in direct conflict with the recent holdings of this Court in *Neese v. Southern Ry. Co.*, 350 U. S. 77, and other federal appellate courts.

The basis of damages under the applicable wrongful death statute is compensation to the surviving husband and ten children for the future earnings that the deceased would have earned during her life expectancy had she lived, reduced to its present cash value, and the value of the services to each of the beneficiaries that deceased would have rendered had she not met her untimely death, reduced to its present cash value. The future earnings of deceased was clearly supported by the record evidence of deceased's age, life expectancy and earning capacity. The value of the services that deceased would have rendered to the beneficiaries, under the wrongful death statute, was clearly supported by the record evidence of deceased's habits, disposition and proclivities to render tender ministrations, unselfish devotion and countless loving services as a wife and mother to her husband and ten children surviving.

The Court below, in concluding that the evidence furnishes no sound basis for the verdict, contrary to established principles of law and invading the province of the jury, failed to view the case in the light most favorable to the petitioners; it relied solely on the past actual earnings of the deceased as conclusive that she would not have earned more during her continued life and substituted its personal judgment for the collective judgment of the jury based upon their "own observations and experiences." And in substituting its personal judgment, the Court below failed to give consideration to the decreased purchasing power of the dollar, *Atlantic Coast Line v. Wells*, 78 Ga. App. 589, 52 S. E. (2d) 496, and relied on past jury awards in several cases, although there are other cases where the awards exceeded the one in the instant case. Compare *Frasier v. Public Service Interstate Transportation Co.*, 1957 (C. A. 2), 244 F. (2d) 668, a case factually similar on the issue of damages where the Court sustained an award of $115,000.00 for the death of a parent who left surviving his widow and three children; *Lebeck v. William A. Jarvis, Inc.*, 1957 (C. A. 3), 250 F. (2d) 285, where an award of $350,000.00 was sustained; and *Lithgow v. Hamilton* (Fla.), 69 So. (2d) 776, where an award of $100,000.00 was sustained for the death of a woman survived by a husband and one son. And in *Blue's Truck Line v. Howell*, 50 Ga. App. 305, 200 S. E. 500, one of the cases cited by the Court below in comparing the jury award herein with past awards, it is interesting to note that the $35,000.00 award therein sustained by the Georgia Court for the loss of the domestic services of the deceased wife and mother in 1937, translated into present day dollar value or purchasing power, would clearly justify the value of the services of the deceased herein assessed by the jury.

Viewing the case in the light most favorable to the petitioners, as it must be viewed on appeal, it becomes clear

that the judgment is amply supported by the evidence of record. The record shows (1) that the deceased earned $1,500.00 per year at the time of her death; (2) that the deceased was 39 years of age when she was killed, at which time she had a life expectancy of 28.27 years; (3) that the deceased was survived by her husband and ten children ranging in age from 4 to 25 years; (4) that the deceased rendered valuable domestic services to each of the petitioners, consisting, *inter alia,* of nursing them while sick, cooking, preparing and serving meals, sewing, cleaning, washing, ironing, making beds, mopping and performing manual work on the family farm and (5) all of the domestic work in the home was performed by the deceased without outside aid or assistance. All these were facts and circumstances for the jury in the light of their own observations and experiences to weigh and appraise in determining the aggregate amount of damages to the petitioners by reason of the untimely death of their devoted wife and mother. From these facts, it is manifest that the damages are not too high. The jury was fully justified in concluding that from the date of death until the termination of the deceased's life expectancy the surviving husband and ten children suffered a substantial loss. Surely it is not beyond reason to place an average value of $2.00 per day for the loss to each of the petitioners of the valuable services rendered by such an unselfish and devoted wife and mother as the deceased. Of course, reasonable men might reach different conclusions—some may conclude the value to be more, and others less, and so likewise the life expectancy of deceased may be reasonably concluded to be more or less; but certainly, it was within the bounds of reasonable inference for the jury to conclude, on the basis of the evidence of record, that the value of the services of the deceased, as a wife and mother, was at least, if not in excess of, an average of $2.00 per day for each beneficiary

and that the life expectancy of deceased was at least 28.27 years, according to mortality tables, if not in excess thereof.

Thus, according to standard annuity tables, based upon the mortality table of an approximate 29 years life expectancy of Mrs. Floyd, the present worth of an annuity of $1.00 for 29 years is $12.278 invested at the high interest rate of seven per cent; and mathematically computed it appears that the present worth of the future value of the services of the deceased as a wife and mother at $2.00 per day or $720.00 per year for each beneficiary amounts to $8,840.16 or an aggregate amount for all of the eleven beneficiaries of $97,241.76, which sum at the termination of the life expectancy period of 29 years will be entirely depleted. Of course, if the computation be made on the basis of the daily rather than the annual value of the domestic services of the deceased the foregoing figure would be even higher.

It should be noted that this figure does not include the present cash value of the future earnings of the deceased during her life expectancy which respondent conceded in its motion for a new trial (R-16) amounts to $16,400.00, thus making a total of $113,641.76 as the value of deceased's life.

Consequently, when we consider the loss of the present cash value of the domestic services of the deceased and add to that the present cash value of the future earnings of the deceased during her life expectancy had she lived, it becomes manifest that $107,500.00 is not more than adequate compensation to which the beneficiaries are entitled under the Georgia wrongful death statute. It should be noted that under Georgia law each of the beneficiaries is entitled to share equally in the entire award, but if any of the beneficiaries is guilty of comparative negligence, his or her share must be proportionately diminished from

the damages recoverable. Based upon such rule it appears that the jury found the husband guilty of comparative negligence and thus, in accordance with the instructions of the Court (R. 282, 286) reduced the amount apportioned to him.

As pointed out before, damages in a case of this nature can not be determined with mathematical certainty, but from the foregoing facts and circumstances, it can be fairly, logically and reasonably concluded, although fair-minded men might reach different conclusions, that the present cash value of the future earnings and services of the deceased as a wife and mother was in consonance with the amount of damages awarded by the jury.

Under the foregoing circumstances, it is clear that the trial judge properly exercised his discretion in refusing to set aside the jury award and grant a new trial on the ground of alleged excessiveness of damages.

In its opinion the Court below stated that it recognizes "that the value of the life of a mother is not determinable solely from the evidence of the amount of money she may have earned or the actual domestic services performed" and "the actual facts of each case should guide the jury in estimating for themselves, in the light of their own observations and experiences and to the satisfaction of their own consciences, the amount which would be fair and just compensation for such loss". The foregoing quoted statements of the Court are in consonance with the applicable law, but the conclusion reached by the substitution of its personal judgment for the collective observations and experiences of the twelve jurors is clearly incongruous therewith.

And in support of the result reached by it, the Court below states in its opinion that the discretion of the trial judge is subject to review by the federal appellate court and may be reversed for what it terms "abuse of discretion."

It is manifest, however, that if the appellate court has discretion to control the discretion reposed in a trial judge this really leaves no discretion at all in the trial judge and thus nullifies the common law power of discretion vested in him. If a federal appellate court can reverse the action of a trial judge in refusing or granting a new trial in the absence of pointing out some specification of abuse, as the Court below failed to point out in the case at bar, on the part of the trial judge, such as under the circumstances noted in *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U. S. 474, 483, 484, namely: "where the amount of damages exceeds a statutory limit; or is more or less than an undisputed amount; or is in pursuance of erroneous instructions on the measure of damages; or is in clear contravention of the instructions of the court; or is the result of passion, prejudice or caprice," it would leave only personal judgment of the appellate court itself as a guide for review and the discretion which respondent claims is vested in the appellate court would smack of arbitrariness, contrary to the meaning of the term "discretion" referred to in *Langnes v. Green*, 282 U. S. 531, 541.

We submit that the discretion reposed by the common law in a trial judge must be exercised according to his own understanding and conscience. On this point, Mr. Justice Clark, speaking for this Court, in *Accardi v. Shaughnessy*, 347 U. S. 260, 266, in dealing with an analogous situation wherein discretionary power is vested in an administrative body, used the following pertinent language:

> "If the word discretion means anything in a statutory or administrative grant of power, it means the recipient must exercise his authority according to his own understanding and conscience."

So, likewise, in the instant case, if the discretionary power vested by the common law in the trial judge means anything, it means that he, as the recipient of this power,

must exercise it, not according to the understanding and conscience of the federal appellate court, but according to his own understanding and conscience. Merely because the Court of Appeals below is of the opinion that the jury should have returned a verdict for a less amount or that the trial judge should have reduced the verdict is no reason for the Court below to reverse the District Judge under the guise of "abuse of discretion." *Railroad Co. v. Fraloff*, 100 U. S. 24.

Moreover, the decisions of the various circuits, with the exception of the 5th, 4th and 9th Circuits, disclose that where the term "abuse of discretion" is mentioned in connection with factual questions arising on motions for new trial generally, it is equated with non-review.

Therefore, it is respectfully submitted that the Court below, by substituting its view of the case for that of the jury, invaded the province of the jury, contrary to the Seventh Amendment to the United States Constitution, and usurped the prerogative of the trial judge, contrary to established principles of law. Its action was also in direct conflict with the recent holding of this Court in *Neese v. Southern Ry. Co.*, 350 U. S. 77, that a federal appellate court may not reverse the action of a trial judge in refusing to grant a new trial on the ground excessiveness of damages where such action of the trial judge is not without support in the record. Compare *Snyder v. U. S.*, 350 U. S. 906.

CONCLUSION

For the foregoing reasons, this Court should grant this petition for a Writ of Certiorari, should reverse the judgment of the Court below, and should affirm and reinstate the judgment of the District Court.

Respectfully submitted,

HENRY HAMMER,
HENRY H. EDENS,
J. H. HIGHSMITH,
GORDON KNOX, JR.,
E. WAY HIGHSMITH
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Attorneys for Petitioners.

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OPINION OF DISTRICT JUDGE OVERRULING MOTION FOR NEW TRIAL

This is an action for the alleged tortious homicide of a wife and mother. The plaintiffs consist of the husband, Deroy Floyd, and ten children of the deceased, Mamie Floyd, the children ranging in age from 4 to 25 years. The defendant is a motor carrier engaged in the delivery of automobiles from assembly plants to various dealers, using an automobile tractor and trailer for that purpose.

The petition of plaintiff alleges: Deroy Floyd and his wife, Mamie Floyd, lived on a farm adjoining and on the southwest side of State Highway No. 15, and about 1/2 mile southeast from Hazelhurst, Georgia. On the night of July 27, 1955, these parties decided to make a telephone call. The nearest telephone was at a filling station just within the city limits of the City of Hazelhurst. The Floyds' means of transportation was a small Farmall tractor and with this they drove upon the highway, proceeding towards the telephone, the husband driving and the wife standing on the back of the tractor. They had reached a point near the city limits of Hazelhurst when a transportation unit of defendant, approaching from the rear ran into the Farmall tractor. In the collision Mamie Floyd was thrown to the pavement, receiving injuries from which her death resulted. Several acts of negligence, including violations of traffic reguiations of the State of Georgia, were charged to defendant, these being in part: Failure to control the speed of defendant's transportation unit so as to avoid running into the Farmall tractor; operating a transportation unit in excess of 50 miles per hour; failing to reduce its speed in approaching and going around a curve in the highway; failing to pass the Farmall tractor being driven in the same direction, a safe distance to the left so as to avoid hitting the tractor, and in failing to keep a proper lookout for other vehicles on the highway.

The defendant alleged that its truck was being operated at a moderate and legal rate of speed, that its driver had just come around a curve in the road and that the Farmall tractor was immediately in front of him in the middle of the right-hand lane of traffic and that said tractor was not equipped with a red tail light as required by the law of the State of Georgia, and Deroy Floyd, as well as the deceased, were charged with being negligent *per se* in this respect. It was further alleged in the answer that if there was any light burning on the rear of the Farmall tractor it was not red but was white and was hidden by the deceased, who was standing on the drawbar of the tractor.

The defendant also contended that the tractor was being driven by Deroy Floyd so slow as to impede traffic and requested the following charge, which was charged by the Court:

> "I charge you that no person shall drive a motor vehicle at such a slow speed as to impede or block the normal and reasonable movement of traffic, except when reduced speed is necessary for safe operation or in compliance with law."

The evidence fully sustained the allegations of plaintiff's petition. It appeared that the Farmall tractor was being driven on the right-hand side of the highway leaving ample passing room on the left. While defendant's driver denied there was a light on the rear of the tractor, several eye-witnesses testified that there was a plainly visible light on the rear. Plaintiffs admitted that this light did not have a red reflector. Defendant's driver testified that in coming around the curve his lights were thrown to the right of the highway and he could not see the Farmall tractor until he was within about 30 feet of it. It was not disputed that the curve was only a 3-degree curve. The Sheriff of the county in which the accident occurred testified he made a test on this highway at night, at the same place,

under similar circumstances, and a tractor with a similar light could be seen for at least 60 feet. The State Highway Patrolman who investigated the accident testified that he was familiar with the highway at this place and approached vehicles at night, with and without lights, and they could be seen 500 to 600 feet ahead. He further stated that he could find no reason why the tractor even without light could not have been seen within ample time to avoid running into it.

The Motion filed by defendant is on the general grounds and in addition, the following grounds: (1) Amount of verdict manifests bias, prejudice and passion by the jury; (2) prejudice of jurors from Jeff Davis County, the county in which the collision occurred, and (3) improper argument of attorneys for plaintiffs.

As to the general grounds, the allegations of the petition were amply supported by the evidence as above stated.

With reference to the amount of the verdict, the laws of the State of Georgia provide in case of homicide of a wife and mother the surviving husband and children may recover for the full value of the life of the deceased.

Georgia Code Section 105-1306:

"Homicide of wife or mother—The husband may recover for the homicide of his wife, and if she leaves child or children surviving, the husband and children shall sue jointly and not separately, with the right to recover full value of the life of the decedent, as shown by the evidence, and with the right of survivorship as to said suit, if either shall die pending the action."

Georgia Code Section 105-1308:

"Full value of life of decedent, as shown by the evidence defined.—The full value of the life of the decedent, as shown by the evidence, is the full value of the life of the decedent without deduction for necessary

or other personal expenses of the decedent had he lived."

As applied to a wife and mother, appellate Courts of Georgia have stated: "She sustains to her husband and his household a relation special and peculiar. Her place cannot be supplied. No other is capable of filling it. The actual facts and circumstances of each shall guide the jury in estimating for themselves in the light of their own observation and experiences and to the satisfaction of their own consciences, the amount which would fairly and justly compensate for the loss".

Metropolitan Street R. R. v. Johnson, 91 Ga. 466 (3) at bottom page 471;

Standard Oil Company v. Reagan, 15 Ga. App. 572 (9).

Blue's Truck Line, Inc., v. Harwell, 57 Ga. App. 139 (7).

Under the evidence the deceased had a life expectancy of 28.27 years and rendered most valuable service to her husband and ten children. The amount of the verdict does not evidence bias and prejudice on the part of the jury, and in the opinion of the Court is reasonable.

In its motion, defendant, by the affidavit of three persons, seeks to establish prejudice on the part of the jurors from Jeff Davis County, Georgia. These facts are disputed by the affidavit of not only several citizens of the county, but by the affidavit of the jurors themselves. If prejudice towards truck drivers existed generally among the citizens of Jeff Davis County, then certainly defendant and its attorneys had ample time to discover such condition (so quickly unearthed after the verdict) prior to the trial and make a proper challenge to the array of jurors at the trial. Defendant does not contend it made any effort to discover any prejudice of the jurors prior to the trial, nor of exer-

cising its right to question jurors on this ground at the trial. No merit appears in this ground of the motion.

Defendant seems to indicate an undue number of jurors were on the panel from Jeff Davis County. An affidavit of the Clerk of Court shows the jurors to have been drawn and panels made up in the regular and proper manner. There is no evidence or knowledge of the Court to the contrary.

The final ground is based on alleged improper argument of J. H. Highsmith, attorney for plaintiffs. It appeared from the evidence that two of the plaintiffs had small children of their own. Mr. Highsmith stated in his argument that a mother continued her services to a child by helping such child with her children. On objection by attorney for defendant the Court directed that such argument be omitted. It is a matter of common experience that a mother does render service to a child by helping with the children of such child. If error was committed by the Court in directing that such argument be omitted, it might well be error in favor of the defendant. Certainly it was not grounds for a mistrial.

Defendant next contends that Mr. Highsmith as attorney for plaintiffs made the statement in his argument "We want to stop these trucks from running the farmers off the highway and a verdict of the full amount of $165,000.00 we think will do it". The burden is one (*sic*) the movant to establish the facts claimed in its motion. The Court reporter was available but defendant did not request the argument of attorneys reported. In the record it appears that Mr. Ringel, of attorneys for defendant, made an objection to argument of Mr. Highsmith, of attorneys for plaintiffs, on ground that he was arguing punitive damages. The Court asked what argument was referred to. Mr. Ringel replied that Mr. Highsmith in substance had stated: "We want you to stop these trucks from running the farm-

ers off the highway, and that a verdict for the full amount of $165,000.00 we think will do it." This was then denied by Mr. Highsmith. The Court directed the jury that such issue was not in the case and for them to disabuse their minds of it. To establish the statement attributed to Mr. Highsmith, defendant submits the affidavit of its attorneys, P. S. Ringel, T. Ross Sharpe and Alvin L. Layne, which states that such was "substantially" his argument. To the contrary Mr. Highsmith makes and submits an affidavit specifically denying the statement attributed to him and stating what he said. All the attorneys are reputable parties. It is impossible for the Court to have a recollection of statements made in arguments to the jury. After taking into consideration the affidavits submitted on the question of this statement alleged to have been made by Mr. Highsmith in his argument, the motion on this ground is denied.

It appearing that the verdict rendered in the case is reasonable and just, the motion for new trial is overruled on all grounds.

So Ordered, this 16th day of August, 1956.

F. M. SCARLETT,
Judge, U. S. District Court.

Filed in Office August 17, 1956.

DECISION OF COURT OF APPEALS FOR FIFTH CIRCUIT

November 13, 1957

Before Hutcheson, Chief Judge, and Borah and Cameron, Circuit Judges.

Cameron, Circuit Judge: Mrs. Deroy Floyd was fatally injured when the Farmall Tractor, on whose drawbar she was riding, was overtaken and struck by an empty motor vehicle carrier owned and operated by appellant, Complete Auto Transit, Inc. The accident happened on a public highway near Hazlehurst, Georgia, in the nighttime on a three

percent curve. This action was brought by the husband and ten children (ranging from 4 to 25 years in age) of the decedent under the Georgia Code, § 105-1306 and § 105-1308. The object of the trip was to enable the decedent to reach a telephone to call a hospital and ascertain the condition of her brother who was ill.

The evidence showed that the deceased was 39 years of age, with an expectancy of 28.87 years, and was working in a garment factory earning as much as $1,500.00 per year. In addition, she performed the duties of wife and mother and assisted her husband in many of his farming activities.

Appellees contended that appellant was operating this motor vehicle at an excessive rate of speed, that its driver was not keeping a proper lookout ahead and that he negligently failed to see the Farmall Tractor being operated by the husband of the decedent in time to avoid running into it. Appellant denied that the driver of its motor vehicle was negligent as charged by appellees, and alleged affirmatively that the collision was caused by failure of the tractor to be equipped with a red tail light as required under Georgia law, and by the fact that the decedent was standing on the drawbar of the tractor in such position as to obscure whatever light there was on its rear.

The jury returned a verdict against appellant in the total sum of $107,500.00, $7,500.00 in favor of the husband and $10,000.00 in favor of each child, and judgment was duly entered for that amount. Appellant moved for a new trial, contending that appellees' counsel made improper and inflammatory argument to the jury, that evidence of an experiment conducted by the sheriff of Jeff Davis County was wrongfully admitted, and that the verdict was excessive as a matter of law. The appeal from the order denying this motion is based upon the same grounds. Our decision will be based upon the ground that the court below abused its discretion in refusing to set the verdict aside as excessive, but the other two assigned errors will be discussed briefly.

During the concluding summation before the jury, Attorney J. H. Highsmith, for appellees, was making an argument which appellant's counsel thought would be proper

only if punitive damages were sought.[1] The attorneys disagree as to just what appellees' attorney did say to the jury, and the record does not present the matter with such clarity as to justify reversal because of the argument, which, if made, would come within the condemnation of the decisions of the Courts of Georgia, *e. g., Southern Stages, Inc., v. Brown*, 1948, 46 S. E. (2d) 765, and of this Court, *e. g., Atlantic Coast Line Railroad Co. v. Kammerer*, 1953, 205 F. (2d) 525, and same case, 1955, 218 F. (2d) 149.

The record before us, insofar as it goes, tends to sustain the position of appellant inasmuch as its attorney quoted the argument of appellee as he understood it, the attorney to whom the argument was attributed responded immediately and did not deny the statement as set forth by his adversary, and the court in its ruling seemed to accept appellant's version of what had been said. But, as stated, the question is not sufficiently presented by the record to justify our reversing the judgment on that ground.

Nor do we base our decision on the alleged error that the court below erred in admitting the testimony of the sheriff concerning the experiment made by him long after the accident and a few days before the trial. A tractor had been placed in the position occupied by the one which had been struck by appellant's motor vehicle, and the sheriff approached from the direction followed by it, making observation as to when the tractor would be visible; and

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[1] During Mr. Highsmith's argument the following took place according to the record:

"Mr. Ringel: Now, if Your Honor please, we move for a mistrial because he is arguing punitive damages.

The Court: What is that?

Mr. Ringel: He is asking the jury to return a verdict for the full amount of $165,000.00 because of these large trucks running people off the highway. He stated in substance 'We want you to stop these trucks from running the farmers off the highway, and that a verdict for the full amount of $165,000.00 we think will do it.'

Mr. Highsmith: No, sir. We are not asking for any punitive damages. We are not entitled to any punitive damages. I haven't said a word about punitive damages.

The Court: Well, let's stick to the facts in the case. We are not trying trucks for running people off highways. Gentlemen of the jury, just disabuse your mind of that.

Mr. Ringel: We move again for a mistrial on that ground.

The Court: Well, I overrule you on that ground. Just argue the evidence, Mr. Highsmith."

he testified as to the distance between him and the tractor when it became visible to him. The situation existing on the night of the accident was not reproduced in all of its details, in that the tractor was standing still at the time of the experiment, the light on it was indisputably a red light, and no person wearing a dress was on the drawbar. It is manifest, moreover, that, in such an experiment, the one conducting it would be focusing his attention primarily on the tractor he knew to be at the particular point and probably to the exclusion of all other objects which normally a motorist would be called upon to include in his attention. The objection to the testimony was probably addressed more to its weight than to its admissibility, but such evidence should be received with caution and proper explanation of its weight and worth should be given to the jury.

Our reversal of the judgment of the court below is based upon the error committed by the court below in denying appellant's motion for new trial based upon the legal excessiveness of the verdict of the jury. Recent decisions of this Court have defined in clear terms the rule applying to such a situation.[2] The rule embraces these ingredients: the granting or refusing of a new trial is a matter resting within the sound discretion of the trial court exercised with regard to what is right and in the interest of justice; but that discretion is subject to review by the appellate court when it feels that injustice has resulted from the action of the lower court because of its conviction that the verdict was excessive as a matter of law and not merely as a matter of fact. In other words, the appellate court will declare that the trial court has abused its discretion if the verdict is so gross or inordinate in amount as to be contrary to right reason; and if the evidence furnishes no sound basis for the verdict, it is the inescapable duty of the appellate court to hold that the verdict was excessive as a matter of law.

We hold that such is the case here. And such a holding is in line with the Georgia statute, which forbids a court to interfere with the jury's action in fixing the dam-

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[2] See, *e. g., Commercial Credit Corp. v. Pepper*, 1951, 187 F. (2d) 71, 75-76; *Sunray Oil Corp. v. Allbritton*, 1951, 188 F. (2d) 751; and *Whiteman v. Pitrie*, 1955, 220 F. (2d) 914, 920-921.

age "unless the damages are . . . so excessive as to justify the inference of gross mistake or undue bias."[3]

The privilege of having the wife and mother with them in the home was one which was incalculably precious to the husband and children and was an element the jury was justified in considering. But such relationships are not readily evaluated by dollar standards, and the Courts of Georgia have not emphasized them in defining what is included in the terms of the Georgia statute[4] granting the right to recover "the full value of the life of the decedent . . . ." In an old case,[5] the court said that the place of a wife cannot be filled and that the actual facts of each case should guide the jury in estimating for themselves, in the light of their own observation and experience and to the satisfaction of their own consciences, the amount which would fairly and justly compensate for such a loss.

A later case[6] stressed the earning capacity and loss of services as the important items in a suit for the death of a wife and mother. But, subsequently,[7] the court recognized that the value of domestic services rendered by a wife could include "the value of many services incapable of exact proof."

The "full financial value of the life of the deceased" was stressed in another case[8] in a decision confined almost entirely to loss of services as the chief element of recovery for the death of a wife and mother; while a broad base of recovery for the intangibles of the wife-mother relationship according to "all the facts and circumstances of the family and the living conditions", was recognized in a more recent

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[3] Georgia Code, § 105-2015.

[4] The Georgia Statutes, Code §§ 105-1306 and 105-1308, permit "the right to recover the full value of the life of the decedent . . . without deduction for necessary or other personal expenses of the decedent had [s]he lived," but the Georgia decisions brought before us do not point definitely to the meaning of these words.

[5] *Metropolitan Street Railway Co. v. Johnson* S. Ct. Ga. 1893, 91 Ga. 466, 18 S. E. 816. The court was not dealing with the statutes here involved, but with damages recoverable by a husband for disabling personal injuries received by his wife.

[6] *Standard Oil Co. et al., v. Reagan et al.* (C. A. Ga., 1915), 84 S. E. 69.

[7] *Central of Georgia Railway Co. v. Keating* (C. A. Ga., 1932), 165 S. E. 873, 878.

[8] *Shermer v. Crowe*, 186 S. E. 224, 228.

case,[9] but a judgment awarding the husband and children a verdict was reversed because the court charged that, in determining "the value of the services of the deceased as a wife and mother, as well as a worker, the jury may consider all the facts and circumstances of the case." The reason given was that the charge was not proper under the pleadings and evidence.

When the same case came on for further hearing,[10] the Court of Appeals reiterated that the value of the life of a wife and mother could not be measured by purely monetary standards, stating that the matter was entirely for the jury. The Court affirmed a verdict for $35,000.00 which, by voluntary act of the plaintiff, had been reduced to $15,000.00.

The last word from a Georgia appellate court was spoken by the Court of Appeals in *Swift & Co. v. Lawson* (C. A. Ga., 1957), 97 S. E. (2d) 168, where the Court set aside, as excessive as a matter of law, a verdict for $80,000.00 rendered to a wife for the wrongful death of her husband. At the time of his death he was thirty-eight years old and his expectancy was practically identical with that of the decedent here, and his earnings were shown to be more than double those claimed in the case before us. The Court discussed a number of Georgia cases and concluded that the jury had a wide latitude in the fixing of damages so long as the result they reached was "fair and reasonable and as authorized by the evidence."

Appellees have not cited us to any case justifying the award of any such amount as that here, but they content themselves with repeating in many different ways the rule we here recognize, that the value of the life of a mother is not determinable solely from the evidence of the amount of money she may have earned or the actual domestic service performed, and that the case is definitely an exception where an appellate court will reverse the action of a trial

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[9] The case is reported three times: *Blue's Truck Line, Inc., v. Harwell* (C. A. Ga., 1937), 194 S. E. 399, 402; reversed by Sup. Ct. of Ga., 1938, 199 S. E. 739; and see fn. 10 *infra*.

[10] *Blue's Truck Line, Inc., v. Harwell et al.* (C. A. Ga., 1938), 200 S. E. 500, 502.

court in passing on a motion for a new trial challenging the size of the verdict.

Appellants have listed eight Georgia cases, which they assert to be all they have been able to find where verdicts have been permitted to stand in cases involving death of a wife and mother. These amounts run from $5,000.00 to $15,000.00, and appellants take the position that the sole question involved is the value of the decedent's life, the number of children surviving, the character of support to which they have been accustomed and like considerations being of no moment. *Cf. Central of Georgia Railroad Co. v. Rouse* (S. Ct. Ga.), 3 S. E. 307; *Macon Consolidated Street Railroad Co. v Barnes* (C. A. Ga.), 38 S. E. 756; *Engle v. Finch* (S. Ct. Ga.), 139 S. E. 868; and *Central Truckaway System, Inc., v. Harrigan* (C. A. Ga.), 53 S. E. (2d) 186.

It is not necessary for us, however, to assess or evaluate the various ingredients which the Georgia Courts recognize as entering into the concept of the value of decedent's life. Taking all of these ingredients into consideration, we hold that there is no justification for a judgment based upon a verdict in the amount fixed by the jury in this case, and that the verdict is excessive as a matter of law and is not sustained by any evidence or authority.

The judgment of the court below is reversed and the case remanded for a new trial.

(Reversed and remanded.)

JUDGMENT

Extract from the Minutes of November 13, 1957

No. 16424

COMPLETE AUTO TRANSIT, INC.

versus

DEROY FLOYD *ET AL.*

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Georgia, and was argued by counsel;

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for a new trial;

It is further ordered and adjudged that the appellee, Deroy Floyd, and others, be condemned to pay the costs of this cause is this Court for which execution may be issued out of the said District Court.

PETITION FOR REHEARING

Come now Deroy Floyd *et al.*, appellees in the above entitled cause, in which, during the present term and on November 13, 1957, a decision was rendered reversing the judgment of the lower court, and petition the court to grant a rehearing therein, upon the following grounds:

1. This Court holds the verdict rendered by the jury and approved by the trial court excessive as a matter of law, basing this conclusion on the ground that "it is not sustained by any evidence or authority." The decision does not indicate what evidence and authority would be required. If the laws and decisions of this State are applicable the verdict is supported by authority and evidence.

The Code of Georgia provides that appellees, comprising the surviving husband and ten children of the deceased wife and mother are entitled to recover the full value of her life.[1] Under the decisions of the Court of Appeals and Supreme Court of Georgia there is no standard set to determine the value of the services rendered by the wife and mother, but it is a question left to the jury to decide, after proof of services, based on their observation and experience to the satisfaction of their own consciences.[2]

The record discloses evidence of the following personal services rendered by the deceased to appellees (Testimony

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1 Georgia Code, §§ 105-1306, 105-1308.

2 *Metropolitan Street R. R. Co. v. Johnson*, 91 Ga. 466 (18 S. E. 816); *Standard Oil Co. v. Ragan*, 15 Ga. App. 571 (84 S. E. 69); *Pollard v. Kent*, 59 Ga. App. 118 (200 S. E. 542); *Blue's Truck Line, Inc., v. Harwell*, 57 Ga. App. 136 (194 S. E. 399); *Ga. Ry. Power Co. v. Shaw*, 25 Ga. App. 146 (3) (102 S. E. 904); *Western & Atlantic R. R. Co. v. Jarrett*, 22 Ga. App. 313 (2) (96 S. E. 17).

of Deroy Floyd, the husband, R. pp. 162-165): There were twelve children born of my marriage to Mamie Floyd. Ten are living. They range in age from four years to twenty-five years. My wife worked in the slip factory in Hazelhurst, having started working there in June, 1949. She did the housework and helped me on the farm. The housework consisted of making beds, cooking, washing, ironing, patching, mopping and yard sweeping. She took care of the children. When they were sick at night she got up with them. She nursed them while they were sick. She got them ready for school. She did all the things that the mother of children do. In addition, she helped me with the farm work. She was always right there to help me do anything that I had to do. She would hoe or plow or do anything that became necessary to help me. She took the job at the slip factory because there was so many of us it looked like we couldn't make it on the farm on shares and she got out to help me meet the grocery bill. She went to work at the slip factory at 8:00 o'clock in the morning. Before going to work she got breakfast for the family and the youngest children ready for school. She worked at the slip factory until 4:30. When she came home frequently she put out her washing in the afternoon. There was always something she could find to do, such as making shirts and little dresses. She got the supper for the family and then she got the younger children ready for bed. She worked and helped with the farm work, too, like putting in tobacco or anything that we were not through with when she got in she would help me. It was admitted that the deceased had a life expectancy of 28.87 years.

The laws of this State authorizing recovery by appellees for the full value of the life of the deceased, this value being a jury question after evidence of death, status of appellees as husband and children and services rendered by deceased, all of which the evidence did show, the conclusion reached by this Court that the verdict is not sustained by any **evidence or authority**[3] is not supportable.

2. There being ample evidence of services rendered by the deceased to appellees, her husband and children, and

[3] All emphasis in this petition supplied.

a loss to appellees of such services for a period of 28.87 (the life expectancy of deceased) and the question of value being a jury question, it cannot be legally said that the verdict is without support in the record.

The verdict having support in the record, the decision of this Court is directly contrary to the holding of the Supreme Court of the United States in the case of *Neese v. Southern Railway Company*, 350 U. S. 77, which holds the test for determining whether or not the court below abused its discretion in approving the amount of the verdict is whether the trial court's action was without support in the record.

It also conflicts with this Court's opinions rendered in the cases of *Texas & Pacific Railway Company v. Buckles*, 232 F. (2d) 257 (17); *Kansas City Southern Railway Company v. Justis*, 232 F. (2d) 267 (7).

3. The record showing appellees entitled to recover the full value of the life of the deceased as determined by the value of proven services rendered by deceased to appellees, the question of the value of such proven services being one for the jury, and there being no evidence from which bias or prejudice on the part of the jury could be shown or inferred, the decision of this Court reversing the judgment of the trial court based on the verdict of the jury, is a denial of appellees' constitutional right to have the matter determined by a jury, such right being provided for in the Seventh Amendment to the Constitution of the United States as follows:

> "Trial by Jury in Civil Cases—In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

To have this Court determine the amount the jury may return for the value of the life of the deceased wife and mother of appellees by limiting such amount, when the verdict returned is supported by the record, is a deprivation

of appellees' constitutional rights as above set forth, to the prejudice and injury of appellees.

4. This Court in its opinion, referring to the case of *Blue's Truck Line, Inc., v. Harwell*, 57 Ga. App., p. 136 (194 S. E. 399, 402), a case decided in 1937 holding a verdict for $35,000.00 for the death of a wife and mother was not excessive, stated:

> "• • • a judgment awarding the husband and children a verdict was reversed because the court charged that, in determining 'the value of the services of the deceased as a wife and mother, as well as a worker, the jury may consider all the facts and circumstances of the case.' The reason given was that the charge was **not** proper under the pleadings and the evidence."

This is an erroneous statement with respect to the holding of the Georgia Court of Appeals, that court holding exactly to the contrary at page 140 of the decision in the following language:

> "The charge of the court to the jury that 'in determining the value of the services of the deceased as a wife and mother, as well as a worker, the jury may consider all the facts and circumstances of the case' was **not** subject to the objection that it was not authorized by the pleading and there was no evidence of any service performed by the deceased as a wife and mother."

As shown, the Georgia Court of Appeals approved the charge of the trial court in this connection rather than reversing the case on account of such charge.

5. The decision of this Court recognizes that appellees are entitled to recover full value of the life of the deceased wife and mother, that such a life includes many services incapable of exact proof, that the value of such services is a jury question, then without stated reason, reaches the unsupported conclusion that the verdict is not sustained by any evidence. It leaves appellees and the trial court, to whom this case is remanded for another trial, totally in the dark as to what evidence this Court would accept as

supporting a verdict for the death of a wife and mother. If by its decision this Court meant to hold that the evidence would support a verdict in some amount, but not the amount rendered, then, still, appellees, the jury, and the trial court judge must guess, without guidance from this Court, at the size of verdict this Court would allow to stand.

May we suggest that under such conditions it is very possible that the case would have to be retried many times, with burdensome expense to all parties, as well as much time consumed by the trial court, in order to arrive at a verdict that would fit this Court's conception of a proper verdict to be rendered for the value of the life of a deceased wife and mother.

WHEREFORE, on the grounds stated petitioners pray that the decision of this Court rendered on November 13th, 1957, be reviewed and the judgment of the trial court affirmed, or, in the alternate, that a rehearing be granted in said matter.

J. H. HIGHSMITH,
GORDON KNOX, JR.,
E. WAY HIGHSMITH,
Attorneys for Appellees.

Certificate of Counsel

I, the undersigned, J. H. Highsmith, of counsel for appellees, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

J. H. HIGHSMITH.

BRIEF IN SUPPORT OF PETITION FOR REHEARING

"THE INJUSTICE OF JUSTICE"

The decision of this Court holds that as a matter of law the life of a wife and mother for a period of 28.87 years does not have the value of $107,500.00. Appellants no doubt applaud this as justice. Since appellees know of decisions of the circuit courts sustaining larger verdicts, not only for loss of life, but for loss of limbs and for personal

injuries not causing death; is it cause to wonder that they may exclaim "The injustice of justice!"

Some of the larger verdicts are as follows:

$297,500.00—Extensive and serious injuries (details not given in reported decision)
Woodington v. Pa. RR. Co., 236 F. (2d) 760 (C. C. A. 2).

$225,000.00—Loss of arms and legs
Union Pac. RR. Co. v. Johnson, 223 F. (2d) 427 (C. C. A. 9).

$150,000.00—Injuries to shoulder and leg—disability
Houlihan v. Turner Constr. Co., 240 F. (2d) 435 (C. C. A. 1).

$126,780.00—Loss of both arms
Blue Ridge Rural Elec. Coop. v. Byrd, 238 F. (2d) 346 (C. C. A. 4).

$125,000.00—Loss of leg
Cereste v. N. Y., N. H. & H. RR., 231 F. (2d) 50 (C. C. A. 2).

$125,000.00 Crippled for life
U. S. v. Luehr, 208 F. (2d) 138 (C. C. A. 9).

$141,500.00—Death $116,500.00—pain and suffering $25,000.00
N. Y., N. H. & H. RR. Co. v. Zermani, 200 F. (2d) 240 (C. C. A. 1).

$114,295.00—Injury to back
E. L. Farmer Co. v. Hook, 239 F. (2d) 547 (C. C. A. 10).

As above noted verdicts substantially larger than the verdict in the instant case have been held not excessive, such verdicts being for loss of limbs, personal injuries of various kinds, and death. How may it be explained, particularly to laymen, that a verdict of $297,500.00 for disabling personal injuries is not excessive but $107,500.00 for the value of the life of a wife and mother to a husband and ten children is excessive; that arms and legs are worth $225,000.00 but a wife and mother is not worth half that sum; that the disability to a man may be legally valued at $150,000.00 but the value of a woman to her family is legally less than $107,500.00; that a wife may recover $141,500.00 for the loss of her husband, but that a husband and ten

children may not recover $107,500.00 for the loss of the wife and mother; and finally, that partial loss of use by injury of a man's back may be valued at $114,275.00, but a $107,500.00 value for the total and permanent loss of his wife to a man and his children is legally excessive? All of this may be understandable to astute legal minds, but may not the legally unlearned husband and children with cause cry of "the injustice of justice?" Even legally trained minds may pause to wonder.

EXCESSIVENESS

The court in its decision on the question of excessiveness refers to the cases of *Commercial Credit Corp. v. Pepper*, 1951, 187 F. (2d) 71, 75-76; *Sunray Oil Corp v. Allbritton*, 1951, 188 F. (2d) 751; and *Whiteman v. Pitrie*, 1955, 220 F. (2d) 914, 920-921.

These decisions were prior to the decision of *Neese v. Southern Ry.*, 350 U. S. 77, 76 S. Ct. 131.

Be that as it may, the decisions of this Court in the cases above referred to hold in substance that the verdict may be excessive as a matter of law (1) if without support in the record, (2) if so monstrous or inordinate in amount as to find no support in right reason.

Seemingly, the decision of excessiveness in the instant case is based on the first proposition, "without support in the record," since it concludes "the verdict is excessive as a matter of law and is not sustained by any evidence or authority." This conclusion is in the face of a prior statement in the decision, "we here recognize that the value of the life of a mother is not determinable solely from the evidence of the amount of money she may have earned or the actual domestic services performed." It is assumed that the Court recognizes, that evidence of extensive services rendered by the deceased wife and mother were shown, and the Georgia rule that the value of such services are to be determined by the jury in the light of their own observation and experience and to the satisfaction of their own consciences. If these two indisputable facts are admitted then the conclusion that the verdict is not sustained "by any evidence or authority" is of itself without support.

If we follow the decisions cited by this Court, rendered prior to *Neese v. Southern Railway, supra*, the other basis on which the decision of excessiveness may be placed is that it is "so monstrous or inordinate in amount as to find no support in right reason."

The writer would certainly not assume, or think, that the decision or excessiveness was placed on such a base, since, so placed, it would necessarily be an indictment of the twelve men of the jury who found such a verdict, and the trial judge who approved it, as acting without right reason. Such an indictment would be without truth. In this day of the devaluated dollar and high prices, continually spiraling higher, a statement to the effect that a value of $107,500.00 placed on 28.87 years of the life of a wife and mother is without support of right reason, seems a statement that might well be described as monstrous and inordinate.

Recently, and particularly since *Neese v. Southern Railway*, this Court has followed the rule that on the ground of excessiveness it would not reverse a judgment based on a verdict of a jury unless "without support in the record." This would seem the proper rule. The determination of "support" in the record is one of fact. The question of an amount of the verdict being monstrous or inordinate is one of opinion on which minds will differ. As the writer interprets the holdings of the Supreme Court it is within the province of the trial court to decide (1) whether verdicts are supported by the record and (2) whether reasonable; the province of the circuit courts to determine whether such verdicts are supported by the record.

If this is not the rule, the Circuit Courts of Appeal may always reverse verdicts of impartial injuries, approved by the trial court, where no other error appears in the record, by deciding the amount of the verdict is monstrous or inordinate.

Thus may be circumvented the holdings of the Supreme Court and rights of parties to trial by jury as provided by the Seventh Amendment to the Constitution.

We submit that this case should be reconsidered and the judgment affirmed.

J. H. HIGHSMITH,
GORDON KNOX, JR.,
E. WAY HIGHSMITH,
Attorneys for Appellees.

DECISION OF COURT OF APPEALS FOR FIFTH CIRCUIT ON PETITION FOR REHEARING

(January 14, 1958)

Before Hutcheson, Chief Judge, and Borah and Cameron, Circuit Judges.

Per Curiam: In their petition for rehearing, appellees challenge the accuracy of our construction of the decisions of the Georgia Courts in *Blue's Truck Line, Inc. v. Harwell et al,*[8] as reflected in the language of two paragraphs of our opinion filed November 13, 1957.[9] A reading of the opinion in the *Harwell case, supra,* as reported in 57 Ga. App. 136, 140, convinces us that appellants are correct, and the two paragraphs quoted in Note 9 *supra* are excised from the opinion, together with Notes 8, 9 and 10 accompanying those paragraphs. In lieu thereof the following paragraph and notes are substituted:

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[8] The case is reported three times: *Blue's Truck Line, Inc., v. Harwell,* C. A. Ga., 1937, 57 Ga. App. 136, 194 S. E. 399; reversed by Supreme Court of Georgia, 1938, 199 S. E. 739; following which the Court of Appeals of Georgia affirmed the judgment of the lower court which it had reversed in the report of the case first listed—200 S. E. 500.

[9] "The 'full financial value of the life of the deceased' was stressed in another case in a decision confined almost entirely to loss of services as the chief element of recovery for the death of a wife and mother; while a broad base of recovery for the intangibles of the wife-mother relationship according to 'all the facts and circumstances of the family and the living conditions', was recognized in a more recent case; but *a judgment awarding the husband and children a verdict was reversed because the court charged that, in determining 'the value of the services of the deceased as a wife and mother, as well as a worker, the jury may consider all of the facts and circumstances of the case.' The reason given was that the charge was not proper under the pleadings and evidence.*'

"When the same case came on for further hearing, the Court of Appeals reiterated that the value of the life of a wife and mother could not be measured by purely monetary standards, stating that the matter was entirely for the jury. The Court affirmed a verdict for $35,000.00 which, by voluntary act of the plaintiff, had been reduced to $15,000.00."

"The 'full financial vale of the life of the deceased' was stressed in another case [10] in an opinion discussing damages arising from loss of services as the chief element of recovery for the death of a wife and mother. But a broad base of recovery for the intangibles of the wife-mother relationship according to 'all the facts and circumstances of the family and the living conditions' was recognized in the decisions of *Blue's v. Harwell, supra.* In that case the jury had awarded damages for the death of a wife in the sum of $35,000.00 and the Court of Appeals refused to set it aside as being the product of gross mistake or undue prejudice or bias on the part of the jury." [11]

The excised paragraphs from the original opinion were based upon the report of the *Harwell case* (57 Ga. App. 136, 140) in 194 S. E. 399, 402,[12] and the opinion as originally written faithfully reflected this holding. But the same paragraph, as published in the Georgia Reports, contains language reflecting a meaning which is the opposite of that set forth in the Southeastern Reporter.

With this modification of the opinion, it is ordered that the petition for rehearing be, and it is DENIED.

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[10] (The portions specifically excepted to are in italics.) *Shermer v. Crowe*, 186 S. E. 224, 228.

[11] *Blue's Truck Line, Inc., v. Harwell et al.* (C. A. Ga., 1938), 200 S. E. 500, 502.

[12] The opinion as there reported reads:

"A charge of the court, that 'in determining the value of the services of the deceased as a wife and mother, as well as a worker, the jury may consider all of the facts and circumstances of the case' is not authorized by the pleadings, and there was no evidence of any services performed by the deceased as a wife and mother."

And the eighth syllabus of the case as reported in 194 S. E. 400 reads as follows:

"In action for death of wife and mother, instruction that, in determining value of services of deceased as a wife and mother, as well as a worker, jury might consider all facts and circumstances of the case, was not authorized by pleadings and evidence."

ORDER MODIFYING OPINION AND DENYING REHEARING

Extract from the Minutes of January 14, 1958

No. 16424

COMPLETE AUTO TRANSIT, INC,

versus

DEROY FLOYD, ET AL.

It is ordered by the Court that the opinion of this Court rendered on November 13, 1957 in this cause be, and the same is hereby, modified in accordance with the opinion this day rendered; and that the petition for rehearing be, and it is hereby denied.